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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 467

MARTIN JIMINEZ, PETITIONER

v.

BRUCE BARBER, District Director of the Immigration and Naturalization Service, Thirteenth Immigration District

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B, pp. v-ix) is reported at 235 F. 2d 922. The opinion on the Motion for Stay of Deportation appears as Appendix A to the petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1956 (Pet. App. C, p. x).[1] A petition for a

[1] The petition erroneously states (Pet. 6-7) that the case was argued on July 12, 1956, and decided the same day. The record shows (R. 21-22) that it was argued and submitted on July 9th and decided on July 12th.

rehearing *en banc* was denied on August 10, 1956 (Pet. App. C, p. xi). The petition for a writ of certiorari was filed September 28, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals, acting for the Attorney General, improperly denied petitioner's application for suspension of deportation after he refused to answer questions as to his membership in the Communist Party.

2. Whether the constitutional bar on bills of attainder is contravened by the Immigration Act of 1917, as amended, which gave deportable aliens who met certain conditions the right to apply for suspension of deportation and prescribed as one condition that the alien shall not have been deportable for membership in the Communist Party.

STATUTES INVOLVED

Section 19(c) of the Immigration Act of 1917, as amended by the Act of July 1, 1948, 62 Stat. 1206, provided in partinent part:

> (c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would

result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. Deportation proceedings shall not be canceled in the case of any alien who was not legally admitted for permanent residence at the time of his last entry into the United States, unless such alien pays the Commissioner of Immigration and Naturalization a fee of $18 (which fee shall be deposited in the Treasury of the United States as miscellaneous receipts). Upon the cancellation of such pro-

ceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 12 of the Act of May 26, 1924 (U.S.C., title 8, sec. 212), for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: *Provided,* That no quota shall be reduced by more than 50 per centum in any fiscal year.

Section 19(d) of the Immigration Act of 1917, as amended by the Act of June 28, 1940, 54 Stat. 672, provided in pertinent part:

> (d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008; U.S.C., title 8, sec. 137), entitled "An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes," as amended; * * *

The Act of October 16, 1918, as amended by the Act of September 23, 1950, 64 Stat. 1006, 1008, provided in pertinent part:

> Sec. 1. * * *
>
> * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> (A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;

* * * * *

Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 * * * (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

STATEMENT

This declaratory judgment action was instituted by petitioner in the District Court for the Northern Dis-

trict of California to challenge the denial of his application for suspension of deportation (R. 3-11). The government's motion to dismiss the complaint was granted by the District Court (R. 18); this action was affirmed on appeal (R. 27).

Petitioner is a citizen of Mexico who has been ordered deported on the ground of illegal entry (R. 3, 5), a ground he does not here contest. At his deportation hearing, petitioner applied for the privilege of suspension of deportation under Section 19 of the Immigration Act of 1917, as amended (*supra*, pp. 2-4)[2] (R. 4). Section 19 (d) of that Act proscribed suspension in the case of aliens deportable under the Act of October 16, 1918, as amended (*supra*, p. 4), which made membership in the Communist Party or the Communist Political Association at any time a specific ground for deportation (*supra*, pp. 4-5). When questioned by the examining officer as to his membership in these organizations, petitioner declined to answer, and, principally on this ground, the hearing officer denied his application for suspension of deportation (R. 5).

The Board of Immigration Appeals, whose opinion is set forth in the Appendix (*infra*, pp. 12-18), approved the decision of the hearing officer, noting that the burden of establishing eligibility for relief was on the applicant (App., *infra*, p. 16). As an additional ground for denying the application, the Board cited petitioner's moral conduct, in that he had lived for twenty-three years with a woman as man and wife and

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[2] The repeal of the 1917 Act by Section 403(a) of the Immigration and Nationality Act of 1952, 66 Stat. 279, 8 U.S.C. 155, was made inapplicable as to pending applications for suspension, as here, by the savings clause of the 1952 Act. Section 405 (a), 66 Stat. 280, 8 U.S.C. 1101, Historical Note.

did not marry her until six days prior to his deportation hearing (App. *infra*, pp. 16-17).

On March 22, 1955, the Board of Immigration Appeals denied petitioner's request to reopen his case; petitioner's request alleged that he would answer questions as to his membership in organizations during the limited time of the preceding five years (R. 6).

The court below, in affirming the dismissal of petitioner's declaratory judgment action, held that the inquiry as to membership was relevant, and declined to characterize as arbitrary the administrative conclusion that petitioner's failure to cooperate at his hearing justified a refusal to treat him as deserving of discretionary relief (Pet. App. B, p. viii). The court further found no abuse of discretion in the refusal to reopen the proceedings, in view of petitioner's limitation on his offer to testify (Pet., App. B, p. ix).

ARGUMENT

1. The Immigration Act of 1917, as amended, in providing for suspension of deportation, made ineligible for such relief aliens who were deportable for having been members *at any time* of certain subversive organizations, and left the decision as to who among qualified applicants should be granted the ultimate relief to the "unfettered discretion" of the Attorney General. *Jay* v. *Boyd*, 351 U.S. 345, 357-358.[3] The granting of the relief of suspension of deportation has been likened by this Court in *Jay* to the pardoning and

[3] Under the present statute, aliens deportable for membership in the Communist Party are not wholly ineligible for suspension. They may be considered for relief if they can prove ten years of continuous residence, good moral character for that time, and exceptional hardship. Section 244(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 215, 8 U.S.C. (a)1254.

parole powers in which relief comes "as an act of grace." 351 U.S. at 354. The Attorney General has delegated his authority in this matter to special inquiry officers, with review by the Board of Immigration Appeals, and has placed the burden of proving eligibility for the relief upon the applicant. 8 C.F.R. (1951 Cum. Supp.) 151.3(e).[4]

Since eligibility under the 1917 statute (as amended) depended upon whether petitioner was within the proscribed class of aliens (*supra*, p. 4), the relevance of the questions he declined to answer is apparent; and his refusal means not only that he failed to meet his burden of proving eligibility, but also that he could properly be found not eligible in fact since silence when called upon to speak has been held to be evidence of the most persuasive nature against an alien. *Bilokumsky* v. *Tod*, 263 U.S. 149, 153-154. On this ground alone, the denial of petitioner's application was both reasonable and unavoidable under the statutory terms.

Moreover, even assuming petitioner's *eligibility* for discretionary relief, the denial in his case was neither arbitrary nor unreasonable. An applicant for suspension of deportation seeks a privilege, not a right (*Jay* v. *Boyd*, 351 U.S. at 354), and one who asks for clemency should make a full and frank disclosure of his background. Questions aimed at developing petitioner's past loyalty are certainly relevant in deciding whether the further hospitality of this country should be extended to him. They are also relevant in determining whether he is worthy of such special relief, in view of the fact that the 1917 Act (as amended) (*supra*, pp. 3-4), as well as the superseding Immigration and

[4] Now 8 C.F.R. (1952 Rev.) 242.54(d). See *Jay* v. *Boyd*, 351 U.S. 345, 351.

Nationality Act of 1952,[5] provide that ultimate cancellation of petitioner's deportation means that the quota list of his country is reduced by one, in derogation of the rights of his countrymen who may be waiting their turn on the list.

Added to these bases for denying suspension as a discretionary matter is petitioner's moral conduct, which was given as a specific ground by the Board of Immigration Appeals for refusing to grant his application (App. *infra*, pp. 16-17). It cannot be said as a judicial matter that this ground did not warrant denial of the privilege of suspension under a statute which places no limits on the exercise of the discretion of the Attorney General or those acting for him. Since there was thus no abuse of discretion by the administrative authorities, there is no occasion for judicial intervention. *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371, 372 (C.A. 2); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 490 (C.A. 2).

2. Legislation denying the privilege of suspension of deportation to an alien on the basis of membership in Communist organizations is clearly not a bill of attainder. On this issue we need go no further than the Court's decision in *Galvan* v. *Press*, 347 U.S. 522, which upheld the constitutionality of the Internal Security Act of 1950, making past membership in such organizations a specific ground for deportation, in spite of a full dress argument that it constituted a bill of attainder. See the Brief for Petitioner, No. 407, O. T. 1953, pp. 53-55. The general principles enunciated in *Galvan* have recently been reaffirmed by the Court in *Marcello* v.

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[5] Section 244(d) of the Immigration and Nationality Act of 1952, 66 Stat. 216, 8 U.S.C. 1254(d).

Bonds, 349 U.S. 302, 314; and see *Jay* v. *Boyd*, 351 U.S. 345, 348.[6]

Since it is constitutional to order deportation on the basis of membership in a Communist group, *a fortiori* the privilege of suspension of deportation can be made to hinge upon that basis. Regardless of the validity of the deportation statute itself, it is reasonable to make the grant of this special privilege (which, as noted above, results in diminution of a quota) dependent on a showing that the alien has never been a member of an organization which Congress has found to be hostile to the interests of the United States. In *Jay* v. *Boyd*, 351 U.S. at 359, the Court explained that the constitutional protections which surround an alien in a deportation procedure do not *ipso facto* apply to him when he is seeking suspension of deportation, "in view of the gratuitous nature of the relief."

The statutes cited by petitioner as having been held to be bills of attainder (Pet. 9-13) are not pertinent; none of them involves the deportation of aliens. Numerous cases in this Court have held that, for constitutional purposes, deportation is not punishment, but a refusal by the Government to harbor persons whom it does not want. See *e. g.*, *Galvan* v. *Press*, 347 U.S. 522, 531; *Carlson* v. *Landon*, 342 U.S. 524, 537; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594-595. Since punishment is an integral part of any definition of a bill of attainder (*United States* v. *Lovett*, 328 U.S. 303, 315, 321-4), a statute involving the deportation of aliens cannot fall into that class.[7]

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[6] An attempt to reargue this issue has been made in *Rowoldt* v. *Perfetto*, now pending on certiorari, No. 34, this Term.

[7] See Brief for Respondent in *Galvan* v. *Press*, No. 407, O.T. 1953, pp. 63-66, for detailed discussion on this point.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ISABELLE R. CAPPELLO,
Attorneys.

NOVEMBER 1956.

APPENDIX

OPINION OF THE BOARD OF IMMIGRATION APPEALS

MARCH 9, 1954

A-4481909—San Francisco

MARTIN JIMENEZ or JOSE MERAZ JIMENEZ or JOSE MARTIN JIMENEZ

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Blanch Freedman, Esquire, 220 Broadway, New York 7, New York. (Heard: January 6, 1953); and Lloyd McMurray, Esquire, 240 Montgomery Street, San Francisco, California.

CHARGES:

Warrant: Act of 1924—No immigration visa.

Lodged: None.

APPLICATION: Suspension of deportation or voluntary departure in the alternative.

DETENTION STATUS: Released under bond.

Respondent has appealed from the decision and order of the hearing officer entered on August 14, 1952, finding him deportable on the charge stated in the warrant of arrest, denying his applications for suspension of deportation, and ordering his deportation from the United States pursuant to law.

This record relates to a 52-year-old married male, a native and citizen of Mexico, who last entered the United States at Calexico, California, on December 31, 1928, at which time he was coming to seek employment and was not in possession of a valid immigration visa.

He has never been admitted to the United States for permanent residence. The finding and conclusion that he is deportable from the United States on the charge stated in the warrant of arrest is sustained by the evidence of record.

During the course of the hearing in deportation proceedings, counsel for respondent first made application for suspension of deportation and, in the alternative, voluntary departure. He then withdrew the request for voluntary departure, leaving only the application for suspension of deportation pending.

The record establishes that the respondent had previously entered the United States in 1917 as an alien laborer. He remained in the United States until 1925, at which time he departed to Mexico, and thereafter reentered the United States illegally about two months later. He was taken into custody by immigration authorities on February 17, 1927, and after a hearing conducted on the same date, deportation to Mexico was effected on March 12, 1927.

The respondent has resided continuously in the United States since his last entry on December 31, 1928. He was married on January 4, 1952 to a woman with whom he had been living since 1929. He testified that he had supported the woman's three children from 1929 until they were married, as well as the woman who is now his wife. He stated that his wife is not in good health and is completely dependent upon him for her support. However, evidence of record (testimony of respondent's spouse) indicates that she has never obtained a divorce from her previous husband who, it appears, deserted her at some time prior to 1929.

During the course of the hearing, the examining officer attempted to question the alien to elicit information from him regarding the alien's affiliation with organizations which might have established the basis for

lodging an additional charge of deportability. Upon advice of counsel, respondent refused to answer any and all questions regarding his membership in or affiliation with certain subversive organizations, namely, the Communist Political Association and the Communist Party of the United States, on the ground of immateriality.

The hearing officer, in his decision and order denying the respondent discretionary relief, stated: "To be statutorily eligible for the grant of either of these privileges (suspension of deportation or voluntary departure), the respondent must be not deportable on any of the grounds specified in Section 19(d) of the 1917 Act. (8 U. S. C. 155). The Act of October 16, 1918, as amended, (8 U. S. C. 137) mentioned in Section 19(d), *supra*, provides for, *inter alia*, the deportation of any alien, who was at the time of entering the United States, or has been at any time thereafter, a member of, or affiliated with the Communist Party of the United States or the Communist Political Association. . . . In view of the respondent's refusal to answer questions material to the issue of his eligibility for discretionary relief, thereby foreclosing the Government from making proper inquiry in the premises, I must perforce deny his application for any form of discretionary relief and order his deportation".

On appeal to this Board, counsel in oral argument has requested that in addition to the brief filed by local counsel in behalf of respondent, oral argument made by appearing counsel in the *Matter of S-*, A-4498284, orally argued on the same date as the instant case, be considered in connection with the determination of this case. In *Matter of S-*, the alien's application for suspension of deportation was also rejected by the hearing officer because of the alien's refusal to answer questions as to whether he had at any time been a member

of the Communist Party or any other organizations on the Attorney General's list of subversive organizations. His refusal in that case was also based on the ground that such questions were immaterial and not germane to the issues before the hearing officer. Counsel argued that as a matter of law such questions were not within the scope of the issue of good moral character which an alien must establish as a basis for eligibility for suspension of deportation. Counsel further contended that Section 22 of the Internal Security Act, amending the Act of October 16, 1918 entitled "an Act to exclude and expel from the United States aliens who are members of the anarchist, and similar classes" is unconstitutional, and therefore the propounding of questions regarding membership in the organizations proscribed by Section 22 of the Internal Security Act was improper and immaterial to an adjudication of eligibility for suspension of deportation. We dismissed the appeal in that case without ruling upon counsel's contentions regarding constitutionality of Section 22 of the Internal Security Act.

Local counsel has also asserted in his brief that the provisions of Section 22 of the Internal Security Act amending the Act of 1918 are unconstitutional as a bill of attainder or a bill of pains and penalties, and as an *ex post facto* law. We shall not rule upon the constitutional questions presented by counsel's assertions in the instant case, as it is not within the province of this Board to pass upon the constitutionality of statutes enacted by Congress. In the *Matter of H-*, III I&N Dec. 411, at 456.

The decision and order of the hearing officer basing the denial of the respondent's application for suspension of deportation upon the alien's refusal to answer questions regarding membership in or affiliation with certain subversive organizations, is hereby approved.

As stated by the hearing officer, the privileges of suspension of deportation or voluntary departure under the Immigration Act of 1917, as amended, may not be extended to any alien who is deportable on any of the grounds specified in Section 19(d) of the Act. The alien must, to establish eligibility for consideration of such relief, affirmatively show that he is not within any of the classes proscribed from the grant of such relief by Section 19(d), as the burden of establishing that he meets the statutory requirements for such relief rests upon the alien (8 C.F.R. §151.3(e)). The hearing officer was under a duty to determine the alien's eligibility for discretionary relief on the basis of all the evidence before him, and he committed no error in considering the alien's refusal to answer questions in determining whether or not discretionary relief should be granted, and in such consideration, in "drawing an inference from the silence of one who is called upon to speak." *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, at 154 (1923); *Circella* v. *Neelly*, 115 F. Supp. 615 (N. D. Ill., 1953).

We here note that there are other unfavorable factors present in this case, established by evidence of record, which warrant denial of discretionary relief, and which we here add as grounds for such denial in approving the decision and order of the hearing officer. The respondent has lived with a woman for a period of twenty-three years who, the record indicates, is legally married to another. The record further reflects that no effort was made to legalize the relationship until six days prior to hearing in deportation proceedings, when they entered into a ceremonial marriage. The record does not affirmatively show that such marriage is a valid one. We therefore conclude that suspension of deportation, had respondent established that he is not within the classes of aliens proscribed from receiving such relief by the terms of Section 19(d) of

the Immigration Act of 1917, as amended, is not warranted as a matter of administrative discretion.

Local counsel for respondent has filed a lengthy brief alleging mainly that the hearing in the respondent's case was in violation of due process of law in that it was not conducted in accordance with the Administrative Procedure Act; that the section of the Supplemental Appropriations Act exempting deportation proceedings from the provisions of the Administrative Procedure Act is unconstitutional and void because it denies to the alien that due process of law which the Act was designed to secure and which was discussed by the Supreme Court of the United States in *Wong Yang Sung* v. *McGrath* (339 U. S. 33 (1950)), and that the examining officer's efforts to elicit information regarding the alien's membership in and affiliation with subversive organizations was improper because no charge had been lodged against the alien regarding deportability under the Act of 1918, as amended, nor was any such charge stated in the warrant of arrest.

Counsel's arguments are without merit. The courts have decided that the provision contained in the Supplemental Appropriations Act of 1950 is constitutional (*Belizaro* v. *Zimmerman*, 200 F. (2d) 282 (C. A. 3, 1952), and have further stated that the provisions of the Administrative Procedure Act do not provide the sole means of affording due process of law under the Constitution and laws of the United States (*United States ex rel Marcello* v. *Ahrens*, 113 F. Supp. 22 (E. D. La., 1953)).

The hearing in the instant case was conducted in accordance with the law and regulations in effect at time of hearing, the alien was represented by counsel, was advised that he could be granted a continuance to prepare a defense for any charge which might be lodged against him during the hearing, and in fact counsel requested and was granted continuance from date of

opening of hearing on January 10, 1952, to February 25, 1952, and from the latter date to June 5, 1952 in order to present his evidence in support of the application for discretionary relief. Careful examination of the entire record reveals no failure of the examining officer or the hearing officer to conduct the hearing in accordance with the applicable regulations. Such regulations are binding on the government, as well as the alien, and constitute for aliens in deportation proceedings that due process of law guaranteed by the federal Constitution to all persons within the borders of the United States. *Ex parte Radivoeff*, 278 Fed. 227 (D. C. Mont., 1922); *U. S. ex rel. Marcello* v. *Ahrens, supra.*

Counsel has cited in support of his arguments numerous cases. We have examined those cases, and find that those involving deportation proceedings are not in point here.

We have carefully considered other points raised by counsel in his brief, and find them likewise without merit.

The order of the hearing officer denying the alien discretionary relief is hereby approved, and the appeal will therefore be dismissed.

ORDER: It is ordered that the appeal be, and the same is hereby, dismissed.